2001

Glade Leon Parduhn v. Natalie Buchi Bennett, Allison Buchi, Annabelle Buchi, Lance Buchi, and Jessica Buchi and Joanne Buchi, University Texaco : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

GLADE LEON PARDUHN,

Appellant,

vs.

NATALIE BUCHI BENNETT, et al.,

Appellees

Appellate Court No. 20010926-SC

Priority No. 15

BRIEF OF APPELLEE JOANNE BUCHI

APPEAL FROM A JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
HONORABLE ANNE STIRBA AND
BRUCE LUBECK PRESIDING

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IDENTIFICATION OF THE PARTIES

The Appellant is Glade Leon Parduhn (hereinafter "Parduhn"), the surviving partner of University Texaco. He was the Plaintiff at the trial court.

The Appellees, the Defendants at the trial court, are the children of the deceased partner of University Texaco, Brad Buchi. They include: Natalie Buchi Bennett, Allison Buchi, Annabelle Buchi, Lance Buchi, and Jessica Buchi (hereinafter the "Buchi Children").

In addition to Brad Buchi's children, JoAnne Buchi, his second wife, was a Defendant at the trial court and an Appellee at the Utah Supreme Court.

Brad Buchi, the deceased partner, hereinafter will be referred to as "Brad".

INTRODUCTION

This is a simple case. Parduhn is trying to cheat Brad's wife and children out of the life insurance proceeds Brad had intended them to get. Parduhn had no insurable interest in Brad's life as of Brad's death. Therefore, Parduhn's attempts are in direct violation of Utah Code Ann. §31A-21-104(5), which may be punishable as a Class B misdemeanor and/or fines pursuant to Utah Code Ann. §31A-2-308.

In addition, the Partnership Agreement with its buy/sell provision mandated that Parduhn relinquish the proceeds of the life insurance policy on Brad's life to his wife and children. Parduhn has insisted that he is entitled to this money based on some spurious claims.

Glade Parduhn and Brad Buchi entered into a Partnership Agreement with a buy/sell provision to operate University Texaco in 1979. The partnership purchased life insurance on each of the partners, increasing it several times over the years. In 1989, the

amount of insurance was increased to $300,000 on Brad's life and $250,000 on Parduhn's life. The buy/sell provision stated that all of the proceeds of the life insurance should go to "the wife and survivors" of the deceased partner and the business should go to the surviving partner.

The partnership sold the two service stations it then owned on July 14, 1997. Brad Buchi died on or about August 7, 1997. As of Brad's death, the partners had not done a final accounting, had not divided all the assets, had not paid all of the partnership debts and, most importantly, had not decided what to do with the life insurance policies purchased by the partnership to fund the buy/sell agreement.

Parduhn is claiming in this action, he personally is entitled to the entire life insurance proceeds on Brad's life and the remaining assets of the business. JoAnne and the Buchi children are claiming that they are entitled to the proceeds.

Judge Lubeck in his thorough and thoughtful decision of August 27, 2001, rejected out of hand Parduhn's claims to the insurance money and the assets of the business.

JoAnne and the Buchi children respectfully request the Utah Supreme Court to uphold Judge Lubeck's decision and put this matter to rest.

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STATEMENT OF APPELLATE JURISDICTION

Jurisdiction exists pursuant to Utah Code Ann. §78-2-2(3).

STANDARD OF REVIEW

The standard of review for appeal of a trial court's finding of fact was set out in Park v. Case, 2001 UT App. 232 ¶16, "We uphold a lower court's findings of fact unless the evidence supporting them is so lacking that we must conclude the finding is 'clearly erroneous.'" *citing* Jeffs v. Stubbs, 970 P.2d 1234, 1244 (Utah 1998). Parduhn, in his Statement of Issues, asserts an erroneous standard of review in this matter. He does not concede that Judge Lubeck's decisions in this case were factual in nature and, therefore the Park standard applies.

Judge Stirba denied Parduhn's Motion for Summary Judgment because there were genuine issues of material fact that warranted a full trial.

Judge Lubeck denied Parduhn's Motion for Determination that any defense by JoAnne Buchi based on Utah Code Ann. §31A-21-104 has been waived. He denied it because Parduhn had reasonable notice of JoAnne's reliance on that statute. It was inferred in the Buchi family's Answer and Amended Counterclaim and specifically cited in JoAnne's Motion-in-Limine.

Parduhn had his day in court to present not only his legal arguments, but his evidence. Judge Lubeck's Memorandum Decision of August 27, 2001 was grounded solidly on the facts and law applicable to this case.

These critical rulings were primarily factual determinations as oppose to legal determinations. There was overwhelming evidence to support each decision. The Utah Supreme Court should uphold the trial court's decisions since there is not and cannot be any finding that is "clearly erroneous".

STATEMENT OF ISSUES ON APPEAL

JoAnne asserts the trial court ruled correctly and Parduhn's appeal is not well taken. The trial court's decisions were appropriate based on the law and facts of this case in the following respects:

1. The trial court (Striba, J.) ruled correctly in her Memorandum Decision of May 22, 2000. (See Decision attached hereto as Exhibit "1").

(a) Judge Stirba found appropriately there were genuine issues of material fact, which precluded granting Parduhn's Motion for Summary Judgment including, but not limited to, whether the partners intended to increase the buy/sell portion of the Partnership Agreement to $300,000 on Brad's life.

(b) Judge Stirba ruled correctly the Partnership Agreement required payment of all the insurance proceeds to the decedent's "survivors", not the deceased's probate estate. Further, Utah Code Ann. §75-6-201(c) specifically provides for non-testamentary transfer of life insurance death benefits pursuant to agreements like the buy/sell agreement in the present case. (See Decision attached hereto as Exhibit "1").

(c) Judge Stirba ruled correctly that JoAnne was Brad's wife at all relevent times and was entitled to a portion of the life insurance proceeds.

2. The trial court (Lubeck, J.) was correct in all aspects of his Memorandum Decision of August 27, 2001. (See Decision attached hereto as Exhibit "2").

(a) Judge Luebeck appropriately determined the partnership had been dissolved as of July 14, 1997, but had not been terminated as of Brad's death on or about August 7, 1997.

(b) Judge Lubeck ruled correctly that the Partnership Agreement, including the buy/sell provision, were still in full force and effect as of Brad's death.

(c) Judge Lubeck found appropriately that Parduhn and Brad intended the "wife and survivors" of the deceased partner to receive all of the proceeds of the buy/sell life insurance and the surviving partner to receive the business "to do with as he sees fit".

(e) Judge Lubeck ruled properly that there was a good reason for the difference in the buy/sell life insurance on Parduhn's ($250,000) and Brad's ($300,000) lives; namely, the partners were attempting to equalize the monthly premium. They could not obtain equal amounts of insurance for equal premiums since Parduhn was older and a smoker.

(f) Judge Lubeck was correct in ruling there was clear evidence Parduhn and Brad intended the increased amounts of insurance was to fund the buy/sell agreement.

(g) Judge Lubeck appropriately ruled that there was no evidence to show the partners intended the buy/sell life insurance proceeds were to be split with $100,000 going to Brad's wife and five children and $200,000 going to Parduhn.

(h) Judge Lubeck determined properly that Parduhn agreed to amend the buy/sell agreement to $300,000 on Brad's life and $250,000 on Parduhn's life. Parduhn read and signed the application for the buy/sell life insurance wherein it stated the purpose of the life insurance was for the buy/sell agreement.

(i) Judge Lubeck ruled properly when he denied Parduhn's pre-trial motion that JoAnne had waived any defense under Utah Code Ann. §31A-21-104. The Court determined Parduhn had ample notice of JoAnne's position in her Amended Counterclaim filed in April 1999 and Motion-in-Limine filed October 26, 2000.

(j) Judge Lubeck was correct in his assessment that Utah Code Ann. §31A-21-104 denies Parduhn any of the life insurance on Brad's life purchased to fund the buy/sell agreement. Parduhn had no insurable interest in Brad's life after the partnership was dissolved. Even if he, arguably, had an insurable interest, his only claim was because of the buy/sell agreement. Therefore, Parduhn's claim and his attempt to procure the proceeds by filing a claim for himself was not authorized by law.

(k) Judge Lubeck was correct in his determination that under Utah Code Ann. §31A-21-104(5) the Court could and would order that Parduhn did not have an insurable interest that would allow him to procure the proceeds of the policy as he attempted for himself.

(l) Judge Lubeck rightly found that Brad did not give Parduhn consent to the issuance of the policy so Parduhn could receive the proceeds, but rather Brad consented only for the purpose of funding the buy/sell agreement.

(m) Judge Lubeck's ruling that JoAnne and the Buchi children are entitled to receive the proceeds of the life insurance policy and Parduhn is entitled to receive the partnership assets is correct.

3. Judge Lubeck correctly concluded there was no need for the second phase of the trial. The second phase of the trial would only be necessary had he ruled in favor of Parduhn regarding the distribution of the proceeds from the life insurance policy on Brad, pursuant to the parties' stipulation regarding bifurcation.

4. Judge Lubeck's signature on September 16, 2001 of the proposed Order and Judgment directing the clerk of the Court to release to JoAnne and the Buchi children the interpleaded insurance proceeds was not in contravention of the rules and was appropriate. If it was in error at all, it was a harmless error due to a miscommunication between Judge Lubeck and

the Court clerk. The Court heard oral arguments and fully considered Parduhn's objections to the proposed Order on October 6, 2001 before denying the objections and signing the Order. Parduhn's so called "due process" rights were in no way compromised by Judge Lubeck's decision.

5. Judge Lubeck properly denied Parduhn's Motion to Stay, pending a final judgment and pending an appeal and enforcement of the Court's Order and Judgment.

DETERMINATIVE STATUTORY PROVISIONS

1. Utah Code Ann. §31A-21-104 - Insurable interest and consent. Utah Insurance Code. (See Decision attached hereto as Exhibit "15").

2. Utah Code Ann. §31A-2-308 - Enforcement penalties and procedures. Utah Insurance Code. (See Decision attached hereto as Exhibit "16").

3. Utah Code Ann. §48-1-18 - Partner accountable as a fiduciary. Utah Uniform Partnership Act. (See Decision attached hereto as Exhibit "17").

4. Utah Code Ann. §48-1-26 - "Dissolution" defined. Utah Uniform Partnership Act. (See Decision attached hereto as Exhibit "18").

5. Utah Code Ann. §48-1-27 - Partnership not terminated by dissolution. Utah Uniform Partnership Act. (See Decision attached hereto as Exhibit "19").

6. Utah Code Ann. §48-1-34 - Right to wind up. Utah Uniform Partnership Act. (See Decision attached hereto as Exhibit "20").

7. Utah Code Ann. §75-6-201(i) - Provisions for payment or transfer at death. Utah Uniform Probate Code. (See Decision attached hereto as Exhibit "21").

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Parduhn entered into a Partnership Agreement with Brad in 1979 to operate several gasoline service stations in and about Salt Lake City, Utah. A typed amendment at the end of the agreement made a buy/sell provision part of the Partnership Agreement. The partnership purchased life insurance policies on each of the partners' lives with the other partner named as beneficiary. The buy/sell agreement required the surviving partner to pay the proceeds of the life insurance policy to the deceased partner's "survivors" in exchange for full ownership of the business.

Over the years, the partners increased the amount of the life insurance policies first to $100,000 on Brad and Parduhn's lives and later to $300,000 on Brad's life and $250,000 on Parduhn's life. The reason for the difference in the amount was so the premiums were roughly equal. Parduhn was older and a smoker so he was not eligible for as much insurance as Brad for the same premium.

Sometime in 1997, the partners decided to sell the two gasoline service stations. The sale documents were signed on July 14, 1997. On or about August 7, 1997, Brad died. He is survived by his wife, JoAnne Buchi and five children. As of the time of his death, the partners had not completed the winding up of the business. Therefore, the partnership may have been dissolved, but it was not terminated. The partners did not have a termination agreement. They had not paid all of the partnership debts. They had not decided how to divide the assets, including the proceeds of the sale of the business. They had not even done an accounting. Most significantly to this case, they had not decided what to do with the life insurance policies that are the basis of this litigation.

Several months after his partner of twenty (20) years had died, Parduhn petitioned Northern Life Insurance Company claiming he was entitled to the proceeds of the life insurance

policy proceeds on Brad's life and not Brad's wife and children. Natalie Buchi Bennett, one of Brad's children, advised Northern Life Insurance that she and the other children should receive the proceeds. Parduhn brought suit against Natalie Buchi Bennett claiming he was entitled to all of the life insurance proceeds and the remainder of the proceeds of the sale of the business. He further claimed damages against Natalie for interference with a contract.

Northern Life Insurance Company interpleded the life insurance proceeds into the Court. JoAnne Buchi, Brad's widow and the other children were later joined as parties.

II. COURSE OF PROCEEDINGS

A. PRE-TRIAL RULINGS AND ORDERS

1. **Memorandum Decision dated May 22, 2002.** Judge Stirba denied Plaintiff's Motion for Partial Summary Judgment. Judge Stirba found that "JoAnne and the Buchi Children are entitled to at a minimum $100,000 of the insurance proceeds as a matter of law, pursuant to the terms of the 1984 'buy-sell' agreement. Furthermore, the Court remains convinced that summary judgment is not warranted concerning the remaining $200,000 of the insurance proceeds, as genuine issues of material fact have been established which preclude summary judgment."

2. **Memorandum Decision dated October 27, 2000.** The Court held a hearing on October 3, 2000 on Plaintiff's Motion for New Trial or to Amend Judgment, Plaintiff's Motion for Summary Judgment, Plaintiff's Motion for Protective Order, JoAnne Buchi's Motion to Extend Discovery Cut-Off for Thirty Days, and JoAnne Buchi's Motion to Extend Time for Designating Witnesses. The Court ruled from the bench on all Motions except Plaintiff's Motion for Summary Judgment. The Court again denied Plaintiff's Motion for Summary Judgment, finding that there were disputed issues of fact regarding whether the partnership was dissolved by

the sale of the two service stations or the death of Brad Buchi. The Court also ruled that there were disputed issues regarding whether the Partnership Agreement and its buy/sell provision remained in full force and effect.

3. **Order dated January 12, 2001.** The Court entered the Order from the hearing held on October 3, 2000. The Court granted Plaintiff's Motion for New Trial or to Amend Judgment and modified its Memorandum Decision dated May 22, 2000, vacating its ruling that JoAnne and the Buchi children are entitled to, at a minimum, $100,000 and reversing its ruling that granted the Motion for Partial Summary Judgment by the Buchi children. The Court let stand its Order that if JoAnne and the Buchi children are entitled to proceeds from the life insurance policy, then the proceeds go directly to them and not through Brad's estate. The Court denied JoAnne Buchi's Motion to Extend Discovery Cut-Off for Thirty (30) days and the Court granted JoAnne Buchi's Motion to Extend Time for Designating Witnesses. The Court granted Plaintiff's Motion for Protective Order and also that JoAnne Buchi reimburse the Plaintiff for attorney fees incurred in opposing JoAnne Buchi's Motion to Extend Discovery and in preparing and briefing his Motion for Protective Order.

4. **Order from the Bench August 20, 2001.** Judge Lubeck denied Parduhn's Motion for Determination that any defense by JoAnne Buchi based on Utah Code Ann. §31A-21-104 has been waived. The Court found that the Amended Counterclaim filed by JoAnne and the Buchi children in April 1999 and JoAnne's Motion-in-Limine filed in October 2000, which referred to the statute by citation, put Parduhn on fair notice.

B. TRIAL COURT RULING

This case was tried before Third District Court Judge Bruce C. Lubeck, sitting without a jury on August 21 and 22, 2001.

Judge Lubeck decided that although the partnership had been dissolved as of July 14, 1997 when the service stations were sold, it was not terminated. Therefore, the Partnership Agreement with the buy/sell provision was still in full force and effect as of Brad Buchi's death on August 7, 1997. As a result, JoAnne and the Buchi children were entitled to the proceeds of the life insurance policy in total and Parduhn was entitled to the business.

Judge Lubeck stated he did not have to reach the issue of the applicability of Utah Code Ann. §31A-21-104 because of his decision regarding the enforceability of the buy/sell agreement. However, he stated that he did believe the statute precluded Parduhn from receiving the life insurance proceeds.

STATEMENT OF FACTS

1. Parduhn and Brad were business partners for many years. They called the business University Texaco and ran several gasoline stations. Parduhn and Brad entered into a Partnership Agreement on May 23, 1979. (See attached hereto as Exhibit "6").

2. The Partnership Agreement included a "buy/sell" provision which read as follows:

> "It is understood by all people concerned, that in the event of the death of either of the partners, Brad K. Buchi or Glade L. Parduhn, that the partnership will end, and all obligations of the deceased's *survivors* financially will be released by paying off the deceased persons [sic] *survivors*. Both partners are insured for $20,000 and *all of which* will go to the deceased persons wife or *survivors*. When the *survivors* receive their $20,000, they release the other partner of any obligation in the business. The surviving partner will own the business and may do with the business as he see's [sic] fit..." (See attached hereto as Exhibit "6").

3. Because the value of the business increased over the years, on January 25, 1984, Parduhn and Brad decided to amend the original Partnership Agreement to provide $100,000 life

insurance policies on each of their lives to fulfill the obligation of the buy/sell provision of the Partnership Agreement. This amendment was reflected in a handwritten note by Brad that said:

> "The partnership agreement will have the following amendment for insurance. The buy-sell insurance will be $100,000. In the event of a death of either partner the remaining partner *shall pay $100,000 to the survivors of the deceased with the proceeds of the $100,000 insurance policy which each own on each other."* (Exhibit "7" Memorandum Decision of Judge Bruce C. Lubeck, August 27, 2001, pg. 2, Trial Transcript - pg. 26, lines 22-25).

4. In 1989, Parduhn and Brad decided to again increase the value of the life insurance policies they had on each other's lives to fund the buy/sell provision of the Partnership Agreement. The insurance policy on Brad's life was increased to $300,000 and the insurance on Parduhn's life was increased to $250,000. (Exhibit "7" - Memorandum Decision of Judge Bruce C. Lubeck, August 27, 2001, pg. 2, Trial Transcript - pg. 27, lines 1-25, pg. 28, lines 1-6).

5. Parduhn and Brad completed and signed applications for the insurance policies with their long time insurance agent, Sheldon Hansen. Sheldon Hansen testified at trial he wrote the application based on what his clients told him. He was never told that some of the insurance was for the buy/sell agreement and some of it was for another purpose. Based on what he was told, he believed the entire amount of the insurance they purchased was for the buy/sell agreement. (Exhibit "7" - Memorandum Decision of Judge Bruce C. Lubeck, August 27, 2001, pg. 2, Trial Transcript - pg. 132, lines 1-8, lines 16-19, pg. 133, lines 17-25, pg. 134, lines 1-20, pg. 136, lines 3-6, pg. 147, lines 11-17).

6. Parduhn never told Mr. Hansen that part of the money was for the buy/sell agreement and part of it was for him personally. He signed the application for the insurance wherein it indicated the policy was for the buy/sell agreement. (Trial Transcript - pg. 148, lines 8-15, lines 21-25, pg. 149, lines 1-6).

7. The applications which are attached hereto as Exhibits "3" and "5" they read in part:

(Brad Kevin Buchi)
APPLICATION

PART I

1. Proposed Insured (Full Name)

Brad Kevin Buchi

13a. Beneficiary. Show name, Social Security No. and relationship to Proposed Insured Glade Leon Parduhn, Partner.

15a. Plan of Insurance (State Plan Title Exactly)b. Amount

Director Plus $300,000

31. Ownership Section

a. Owner's Name Glade Parduhn

c. Relationship to Proposed Insured Partner

f. State purpose of insurance and nature of Owner's insurable interest.

Buy Sell/Partner

DECLARATION

I/We declare to my/our best knowledge and belief, the answers shown in this application are complete and true. I/We agree:

DATED AT Salt Lake City, Utah THIS 4 DAY OF JAN, 19 89

Glade Parduhn
Applicant if Other Than The Proposed Insured

X Brad Buchi
Proposed Insured

(Glade Leon Parduhn)
APPLICATION

PART I

1. **Proposed Insured (Full Name)**

13. **Beneficiary** Show name, Social Security No. and relationship to Proposed Insured

Brad Buchi, Partner

15a. **Plan of Insurance** (State Plan Title Exactly) b. Amount

Director Plus $250,000

31. **Ownership Section**

a. Owner's Name Brad Buchi

c. Relationship to Proposed Insured Partner

f. State purpose of insurance and nature of Owner's insurable interest.

Buy Sell/Partner

DATED AT Salt Lake City, Utah THIS 4 DAY OF JAN, 19 89

Brad Buchi
Applicant if Other Than The Proposed Insured

X Glade Parduhn
Proposed Insured

8. Lisa Buchi, Brad's wife at the time of the 1989 application for the insurance policies testified she called Sheldon Hansen to discuss increasing the amounts on the life insurance policies for the buy/sell agreement. (Exhibit "2" – Memorandum Decision of Judge Bruce C. Lubeck, August 27, 2001, pp. 2, 3, Trial Transcript - pg. 101, lines 10-25, pg. 102, lines 1-25, pg. 103, lines 104).

9. The partners decided to pay roughly the same amount in monthly premiums for the two life insurance policies purchased for the buy/sell agreement. Because Parduhn was older and a smoker, they were able to obtain life insurance on him for $250,000, while they were able

to obtain $300,000 on Brad's life for roughly the same amount of monthly premiums. (Trial Transcript - pg. 105, lines 2-14).

10. Glade Parduhn reaffirmed the following deposition testimony at the trial:

"Q: There did come a time when the insurance policy was increased from $100,000 to $300,000 on Brad and $250,000 on you, correct?

A: Yes.

Q: Two separate policies? Do you know approximately when that was?

A: Probably – well, let's see, it was probably six years before we sold. How long was that? Ninety-two? I would have to look at the insurance policy, ma'am. I don't know for sure.

Q: Can you remember how it came about that those amounts were increased on those two polices?

A: Well, we decided we just wanted bigger policies on each other, because of the stations.

Q: Was it based on a discussion you had with Brad?

A: Yeah. The business were doing fairly well at that time. We decided to increase them.

Q: And then you mentioned that several times thereafter you talked about why you increased the amounts on those two insurance policies. Am I with you on that?

A: The reason we increased them is because the business were making money at the time. We just decided to get bigger policies on each other, to take care of each other if anything should happen.

Q: When you say the businesses were making more money, I take it that the value of the businesses had actually increased.

A: Yes.

Q: And one of the thoughts was that if you increased the amount to $300,000 on Brad and 250 on you, you would reflect the increase in the business. Is that a fair statement?

A: That's fair. (steno)"

(Trial Transcript - pg. 48, lines 8-25, pg. 49, lines 1-12).

11. Parduhn and Brad never executed any document at anytime or any place indicating that the deceased partner's family would only get a portion of the insurance money and the surviving partner would get a portion of the insurance money. (Trial Transcript - pg. 44, lines 17-24).

12. In the early part of 1997, Parduhn and Brad decided to sell the service stations. A sale was negotiated with Blackett Oil Company for $1,000,000.00. The sale was finalized on July 14, 1997. (Exhibit "2" – Memorandum Decision of Judge Bruce C. Lubeck, August 27, 2001, pg. 3, Trial Transcript - pg. 32, lines 13-24).

13. Brad died on or about August 7, 1997. (Exhibit "2" – Memorandum Decision of Judge Bruce C. Lubeck, August 27, 2001, pg. 3, Trial Transcript - pg. 36, lines 7-25).

14. Parduhn and Brad never executed any dissolution or termination agreement between them or filed any dissolution or termination documents with any bank or governmental entity as of the time of Brad's death. (Trial Transcript - pg. 49, lines 16-25, pg. 50, lines 1-18).

15. The partnership had not been terminated as of the date of the sale or as of the date of Brad's death since there were still many outstanding issues to be resolved, including what to do with the life insurance polices on both the partners. They had not done an accounting, had not divided all of the assets of all of the debts. (Exhibit "2" – Memorandum Decision of Judge Bruce C. Lubeck, August 27, 2001, pg. 3, Trial Transcript - pg. 36, lines 7-25, pg. 50, lines 1-18).

SUMMARY OF ARGUMENT

Utah Code Ann. §31A-21-104 requires that the beneficiary of a life insurance policy have an insurable interest in the life of the owner of the policy. Glade Parduhn's only insurable interest in the life of Brad Buchi was as his business partner. Brad and Parduhn entered into a

Partnership Agreement with a buy/sell provision funded by life insurance policies The buy sell/agreement was amended once in 1984, and the trial court found that it was amended again in 1989 when the policies were again increased The partnership was dissolved on July 14, 1997 upon the sale of the assets, however, the buy/sell agreement still applied and was enforceable when Brad Buchi died, as the partners had not finished winding up the partnership There was ample credible evidence that the partners had amended the buy/sell agreement in 1989 for Judge Lubeck to conclude that in fact the partners did amend the agreement Glade Parduhn's rights of due process were not in any way compromised in this case as he had every opportunity to be heard and his own counsel agreed that the second phase of the trial would not proceed if Judge Lubeck ruled in favor of JoAnne Buchi and the Buchi Children

ARGUMENT

I. UTAH CODE ANN. §31A-21-104 REQUIRES THAT THE BENEFICIARY OF A LIFE INSURNACE POLICY HAVE AN INSURABLE INTEREST IN THE LIFE OF THE OWNER OF THE POLICY.

A. Glade Parduhn's only insurable interest in the life of Brad Buchi was for the purpose of the "buy/sell agreement.

Utah Code Ann. §31A-21-104, as amended, is controlling in reference to the entitlement of the proceeds from the life insurance policy on the life of Buchi Utah Code Ann §31A-21-104, "Insurable Interest and Consent" was recommended by the Utah Insurance Recodification Commission (Spencer Kimball, Chairman), and adopted by the Utah State Legislature in 1985

Utah Code Ann §31A-21-104 states

> "(1)(a) *A person may not knowingly procure, direct, by assignment, or otherwise, an interest in the proceeds of an insurance policy unless he has or expects to have an insurable interest in the subject of the insurance.*
>
> (c) Except as provided in Subsections (6) and (7), *any insurance provided in violation of this subsection is subject to Subsection (5)*

(2) As used in this chapter:

(a) *"Insurable interest" in a person means, for persons closely related by blood or by law, a substantial interest engendered by low and affection,* or in the case of other persons, a lawful and substantial interest in having the life, health, and bodily safety of the person insured continue. Policyholders in group insurance contracts needs no insurable interest if certificate holders or persons other than the group policyholders who are specified by the certificate holders are the recipients of the proceeds of the policies. Each person has an unlimited insurable interest in his own life and health. *A shareholder or partner has an insurable interest in the life of other shareholders or partners for the purposes of insurance contracts that are an integral part of a legitimate buy-sell agreement respecting shares or a partnership interest in the business.*

. . .

(3) Expect as provided in Subsection (4), *no insurer may knowingly issue an individual life or disability insurance policy to a person other than the one whose life or health is at risk unless that person,* who is 18 years of age or older and not under guardianship under Title 75, Chapter, Protection of Persons Under Disability and Their Property, *has given written consent to the issuance of the policy.* The person shall express consent either by signing an application for the insurance with knowledge of the nature of the document, or in any other reasonable way. Any insurance provided in violation of this subsection is subject to Subsection (5).

. . .

(5) *No insurance policy is invalid because the policyholder lacks insurable interest or because consent has not been given, but a court with appropriate jurisdiction may order the proceeds to be paid to some person who is equitably entitled to them, other than the one to whom the policy is designated to be payable,* or it may create a constructive trust in the proceeds or a part of them on behalf of such a person, subject to all the valid terms and conditions of the policy other than those relating to the insurable interest or consent." (See complete statue as Exhibit " " attached hereto).

The Utah Legislature adopted Utah Code Ann. §31A-21-104 in 1985 after exhaustive research, revision and recommendation by the Utah Insurance Recodification Commission. Prior to the enactment of the Utah Insurance Code in 1985, much of our

insurance law developed illogically through inconsistent court decisions and the common law. The Commission's mission was to clearly establish Utah's insurance law.

Prior to the adoption of Utah Code Ann. §31A-21-104, the concept of "insurable interest" was subject to widely different definitions and applications throughout the United States and common law jurisdictions. Hence, the Utah Insurance Recodification Commission deemed it vitally important to define "insurable interest" once and for all in order to protect those who should be protected from misappropriation and misuse of life insurance proceeds.

The concept of "insurable interest" in §31A-21-104 is clear and concise:

> *"Insurable interest" in a person means, for persons closely related by blood or by law, a substantial interest engendered by love and affection..."*

There is no question in the present case, JoAnne and the Buchi children have an insurable interest in the life of her husband and their father, Brad Buchi.

The Utah Legislature recognized, however, there were other times certain individuals and entities should be able to secure life insurance in a non-family member. One such situation is in a partnership where there is a buy/sell agreement. In such instances, the partners have life insurance policies on each other's life so that the surviving partner will have the money to purchase the interest in the business of the deceased partner's family. In such arrangements, the family of the deceased partner gets the insurance proceeds and the surviving partner gets the business:

> *"A shareholder of partner has an insurable interest in the life of other shareholders or partners for the purposes of insurance contracts that are an integral part of a legitimate buy-sell agreement respecting shares or a partnership interest in the business."*

This legislative mandate is also clear and concise. It is not subject to the twisted interpretation Parduhn espouses. It does not say "A shareholder or partner has or once had an interest..." It does not recognize an insurable interest without a "legitimate buy-sell agreement".

Our courts have consistently held that in interpreting statutes, we should give effect to legislative intent by first looking to the plain meaning. Evans v. State, 963 P.2d 177 (Utah 1998). "Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition." Utah Code Ann. 68-3-11, as amended. Unless inconsistent with manifest legislative intent, "Person" includes individuals and also corporations. Utah Code Ann. 68-3-12(2)(o), as amended. Assume the legislature used each term advisedly according to its ordinary and accepted meaning. Rehn v. Rehn, 974 P.2d 306 (Utah Ct. App. 1999). Determine whether a statute is "ambiguous" by considering whether it is capable of two or more plausible meanings. Derbidge v. Mutual Protective Insurance Co., 963 P.2d 788 (Utah Ct. App. 1998). If doubt or uncertainty exists as to the meaning or application, analyze the entirety and attempt to harmonize in accordance with legislative purpose and intent. In re Worthen, 926 P.2d 853 (Utah 1996). Interpret an ambiguous statute in a reasonable way to achieve the best results in practical application, avoid unacceptable consequences, and achieve sound public policy. Debridge v. Mutual Protective Ins. Co., 963 P.2d 788 (Utah Ct. App. 1998). Seek to give effect to all provisions, so that no part will be

inoperative or superfluous, void or insignificant, and so that one section will not destroy another. Reedeker v. Salisbury, 952 P.2d 577 (Utah Ct. App. 1998).

Utah Code Ann. §31A-21-104 is straight forward and abundantly clear. No reasonable interpretation of it could be construed to give Parduhn an insurable interest after the partnership dissolved and at the time of Brad's death.

Sheldon Hansen, the insurance agent who sold Parduhn and Brad the life insurance policies throughout the years, recognized the importance of Parduhn and Brad having a legitimate buy/sell agreement and, therefore, legitimate insurable interests. He testified at trial:

> "Q. In Mr. Parduhn's testimony and more particularly in his deposition but also in trial, he testified that: "I think Sheldon put that in there, the buy/sell reference in the application, so that we could get a policy on each other."
>
> Do you remember a conversation with Mr. Parduhn when you told him about the buy/sell indication having to go into that insurable interest?
>
> A. I am not sure what the inference, "Sheldon put it in there." I wrote it. I -- but I write -- everything in an application I write, I write at the instruction of my client.
>
> Q. Okay. And it was written in there: "For the purpose of demonstrating the existence of an insurable interest"; correct?
>
> A. That's correct.
>
> Q. And you had a conversation with Mr. Parduhn to the effect that this particular policy was being purchased with reference to that buy/sell agreement or a buy/sell agreement?
>
> A. I would presume that's correct. That's a long time ago, and I don't remember every word in those conversations. But that is consistent with my understanding of the intent of these policies, and it's consistent with what I have recorded on the applications.

Q. Is that also consistent with your understanding as to the requirements of insurable interest?

A. Yes.

(Trial Transcript - pg. 133, lines 17-25, pg. 134, lines 1-20).

None of the treatises or cases cited by Parduhn are relevant or helpful to the present case. None one of the treatises comments on statutes dealing with insurable interest but, only the ambiguous definitions through the common law of insurable interest.

Not one of the treatises comments on Utah law. Not one of the cases is a Utah case. Not one of the cases interprets a statute similar to, let alone identical to, the Utah statute. Most of the treatises and cases pre-date the enactment of our current law.

For example, in Herman v. The Provident Mutual Life Insurance et al, 886 F.2d 529 (US Crt. App 2nd Cir. 1989) cited by Parduhn to support his position that one need only have an insurable interest at the time the insurance is obtained and not at the time of the death, is clearly distinguishable. In Herman, New York Insurance Law Section 3205(b)(2) clearly and unequivocally states that an insurable interest in the life of another need only exist "at the time which [the insurance] contract is made." That is not what Utah Code Ann. §31A-21-104 says. Indeed, our statute states the opposite.

The only Utah case cited by Parduhn in this regard is Culbertson v. Continental Assurance Company, 631 P.2d 906 (Utah 1981). Contrary to what Parduhn asserts, the Culbertson case is not analogous in the least. In Culbertson, decedent's second wife brought an action against decedent's former wife for certain life insurance proceeds and profit sharing proceeds. Decedent had not changed the beneficiary designation on those policies or the profit sharing plan following his divorce. He did, however, change the

beneficiary on some other policy to his second wife, as well as leaving her all his assets under his will. Decedent had six children with his first wife, four of whom were still minors as of the time of the divorce and one child with his second wife. The court reasoned that in this situation, decedent had good reason to leave his former wife as beneficiary on some of the policies and profit sharing plan. This construction does not run afoul of even the common law definition of insurable interest.

> "Similarly, if the decree of divorce orders one spouse to pay the other alimony, the insurable interest of the spouse receiving such payments will continue at least during the time the alimony is so payable. Or, if the care and custody of the children of the marriage requires the support of the husband or wife under the decree of divorce, that spouse being under a legal duty to provide such support, will cause the insurable interest of the other spouse in the life of the supporter to continue to exist." Freedman's Richards on Insurance §2.3 at 164 (6th ed 1990).

Obviously, the divorce situation where there are a number of children from the first marriage is dramatically different from the present case. Also of note, the Culbertson case was prior to the enactment of Utah Code Ann. §31A-21-104. ********

Under §31A-21-104, Parduhn had an insurable interest in Brad's life only if the life insurance policy was "an integral part of a legitimate buy/sell agreement respecting shares of a partnership in the business." Therefore, the proceeds of the life insurance policy must be paid to JoAnne Buchi and the Buchi children, as part of the buy/sell agreement, which was still in effect during the winding up of the partnership's affairs.

Because Parduhn had no other insurable interest in Brad's life at the time of his death, as required by §31A-21-104, he cannot collect the proceeds from the life insurance policy. Thus, §31A-21-104(5) requires the Court to order the distribution of the proceeds of the life insurance policy to the people equitably entitled to the proceeds - JoAnne Buchi and the Buchi children. This is exactly what Judge Lubeck did.

B. Plaintiff/Appellant is violating the Utah Insurance Code and, therefore, may be guilty of a Class B. Misdemeanor.

Utah Code Ann. §31A-2-308, Enforcement and Penalties and Procedures (3) and (9) reads as follows:

> "(9) A person who intentionally violates, intentionally permits any person over whom he has authority to violate, or intentionally aids any person in violating any insurance statute or rule of this state or any effective order issued under Subsection §31A-2-201(4) is guilty of a class B misdemeanor. Unless a specific criminal penalty is provided elsewhere in this title, the person may be fined not more than $10,000 if a corporation or not more than $5,000 if a person other than a corporation. If the person is an individual, the person may, in addition, be imprisoned for up to one year. As used in this subsection, 'intentionally' has the same meaning as under Subsection 76-2-103(1)."

Parduhn had no insurable interest as described heretofore. He cannot obtain these insurance proceeds without violating this statute. For him to attempt to obtain the insurance funds runs afoul of the law, therefore Parduhn's appeal is not well taken.

C. JoAnne did not waive her right to raise governing statutory law in support of her Amended Counterclaim.

JoAnne's assertion that §31A-21-104 barred Parduhn's claim to the life insurance proceeds was not an affirmative defense to Parduhn's Complaint. Rather, JoAnne cited §31A-21-104 in support of her Amended Counterclaim. JoAnne's Amended Counterclaim requested the Court to grant relief in the form of a "declaration that Glade Parduhn has no interest in the proceeds of Northern Life Insurance Policy No. NL00989085 on Brad Buchi's life." (Amended Answer and Counterclaim - ¶ 1 at 6, April 9, 1999). Thus, two years prior to trial, Parduhn was put on notice by JoAnne's Amended Counterclaim that he did not have an interest in the proceeds of the life insurance police.

Rule 8(a) of the Utah Rules of Civil Procedure requires that a counterclaim "shall contain (1) a short and plain statement of the claims showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled." Utah R. Civ. P. 8(a)(1) and (2) is identical to Fed. R. Civ. P. 8(a)(2) and (3). Federal Rule 8(a) abandoned the complicated requirements of code pleading and adopted the modern approach of "notice" pleading. A pleading satisfies the notice requirement if it notifies the adverse party of the claim and the requested relief to a degree sufficient to enable the adverse party to formulate a response.[1] Under the notice pleading standard, "the pleading need *not* identify any particular legal theory under which recovery is

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[1] See e.g. *Yamaguchi v. United States Dep't of Air Force,* 109 F.3d 1475, 1481 (9th Cir. 1997).

sought."[2] JoAnne's Amended Counterclaim satisfied the notice pleading requirements of Rule 8(a) sufficient to allow Parduhn to formulate a response. Thus, she is entitled to inform the Court of governing statutory law.

Parduhn would have this Court abandon modern notice pleading, however, and return to the ancient days of code pleading. Code pleading caused "frightful expense, endless delay and an enormous loss of motion."[3] The absurdity of code pleading is best described in an exchange between the great Baron Parke [4] and Sir William Earle. Baron Parke boasted to Sir William that he had assisted in the authoring of sixteen volumes of Meeson & Welsby (reports devoted primarily to procedure in the Court of Exchequer). Sir William replied "It's a lucky thing that there was not a seventeenth volume, because if there had been, the common law itself would have disappeared altogether amidst the jeers and hisses of mankind." [5]

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[2]*Crull v. GEM Insurance Co.,* 58 F.3d 1386, 1391 (9th Cir. 1995) (emphasis added); citing *Elec. Const. v. Maintenance Co., Inc. v. Maeda Pacific Corp.,* 764 F.2d 619, 623 (9th Cir. 1985); See also *Vidimos, Inc. v. Laser Lab Ltd.,* 99 F.3d 217, 222 (7th Cir. 1996).

[3]Skinner, *Pre-Trial and Discovery Under the Alabama Rules of Civil Procedure,* 9 Ala. L. Rev. 202, 204 (1957).

[4] "A consummate lawyer," Baron Parke "devoted his great talents to his work, and by industry and personality placed himself in the first rank of English judges. It has been alleged that he was pedantic and had 'an almost superstitious reverence for the dark technicalities of special pleadings." A.W.B. Simpson, *Biographical Dictionary of the Common Law,* 402 (Butterworth & Co., 1984).

[5] Lord Coleridge, *The Law in 1849 and the Law in 1889*, 57 Contemp. Rev. 797, 798 (1890).

In addition, JoAnne filed a Motion-in-Limine on October 26, 2000, specifically citing Utah Code Ann. §31A-21-104. This motion was filed ten months prior to the trial in this case. Contrary to what Parduhn states in his brief to this Court, JoAnne did not "promptly withdraw her motion. Rather, at the Pre-Trial Conference with Judge Stirba in early December 2000, the court advised counsel she would consider the implications of Utah Code Ann. §31A-21-104 at the time of trial as a matter of potential applicable substantive law. JoAnne has never withdrawn or wavered in her belief that §31A-21-104 precludes Parduhn from taking the insurance proceeds intended for Brad's family.

Because Joanne's Amended Counterclaim coupled with the Motion-in-Limine complied with the notice pleading requirement of Rule 8(a), the trial court denied Parduhn's Motion for Determination That Any Defense by JoAnne Buchi Based on Utah Code Ann. §31A-21-104 Has Been Waived. But, in an effort to be abundantly fair to Parduhn, Judge Lubeck allowed Parduhn's counsel extra time to prepare for his closing arguments so he could further research this issue:

> "MR. FISHBURN: Your Honor, yesterday when we were debating the motions especially on what I term a new argument, you indicated that if we felt we needed a little bit of addition time to brief the final argument to this Court and prepare it, that you would indulge that request. I would certainly make that request. I would like a little bit of time to basically do some research on the interpretation of that statutory provision and also to sift through the evidence that's been received today; and, thus, I would request that, as we had two days reserved for trial, that we defer the closing argument until tomorrow afternoon or even any time within the next week. I'd prefer it not be subsequent to that or I think we start to forget what it was that was deduced here.
>
> THE COURT: Mr. Tanner, Mr. Dunn, what's your position?
>
> MR. TANNER: Your Honor, I have no objection to that. I would like to give Mr. Fishburn whatever time he feels is appropriate to prepare for his closing arguments.

THE COURT: Mr. Dunn.

MR. DUNN: Mr. Fishburn actually approached me about this. And in view of the Court's prior discussion, I have no objection to it because it is important to us that this statute be applicable to this case as this Court has previously ruled, and as there is an order somewhere for your signature. And if Mr. Fishburn needs an additional day, I have no objection.

THE COURT: Well, I don't mean to try to be cute or anything, but if we go - I forget things faster than you all do. Tomorrow is as far as I want to go. But I'm certainly willing to do it tomorrow afternoon. But I am serious, if we go much beyond that, I'll start to forget things, so...

MR. FISHBURN: That's fine."

Parduhn was not disadvantaged in anyway and had ample notice of JoAnne's legitimate reliance on §31A-21-104.

D. Section 31A-21-104 is not a defense to enforcement of an insurance contract - it is a regulatory statute setting forth the requirements of *all* insurance contacts.

Section §31A-21-104 is not a statutory defense. Rather, as incorporated in Chapter 21 of the Utah Insurance Code, it is a regulatory statute that is one of the "general rules" that apply to all enforceable insurance contracts in Utah. Because the statute is regulatory in nature, its provisions do not constitute an affirmative defense, but govern the interpretation of all insurance contracts, including the policy on the life of Brad Buchi.

E. The trial court did not base its decision on Utah Code Ann. §31A-21-104.

JoAnne's counsel firmly believe §31A-21-104 is controlling in this case. However, contrary to the assertion made by Parduhn in his brief, Judge Lubeck did not base his decision on §31A-21-104. In his Memorandum Decision of August 27, 2001, Judge Lubeck stated:

> *"The court does not find it necessary to reach the application of the statute cited and relied on by Joann Buchi given the ruling concerning the facts."*

((See attached hereto as Exhibit "2").

Even though Judge Lubeck did not base his decision on §31A-21-104, it is worthwhile to the present appeal of this case to review his reasoned analysis of §31A-21-104 application here:

> " However, the court is of the opinion that U.C.A. 31A-21-104 does deny relief to Plaintiff. Defendants argue that Plaintiff did not have an insurable interest simply because he was a partner. Plaintiff argues that being a partner gives him an insurable interest, even if there was not a buy-sell agreement. The court believes that the Utah statute does not give Plaintiff an insurable interest merely because of his status as a partner. However, even if it does the court's reading of the statute precludes relief for Plaintiff.
>
> Defendant JoAnne Buchi also argues that there was no consent by Buchi for his life to be insured and thus Plaintiff fails.
>
> Even if Plaintiff had an insurable interest as a partner, his only claim to the proceeds was because of the buy-sell agreement. U.C.A. 31A-21-104(1)(b) provides that 'a person may not knowingly procure, directly, by assignment, or otherwise, an interest in the proceeds of an insurance policy unless he has or expects to have an insurable interest in the subject of the insurance.' The statute goes on in subsection (2) to discuss what an insurable interest is and states that 'a. . .partner has an insurable interest in the life of other. . .partners that are an integral part of a legitimate buy-sell agreement respecting. . .a partnership interest in the business.' If Plaintiff had an insurable interest because he was a partner, his claim to the proceeds was only as a result of the buy-sell agreement. The buy-sell agreement allowed him to procure the proceeds but not in the manner which he attempted. Plaintiff was entitled only to obtain the proceeds and then pass them on to the survivors as agreed in the buy-sell agreement.
>
> If the partnership does give Plaintiff an insurable interest, the partnership itself was not the reason, as concluded above, that the insurance was obtained in 1989. The only legitimate reason the partners had to obtain insurance on each other was for the buy-sell agreement. Thus, Plaintiff's claim and his attempt to 'procure' the proceeds by filing a claim for himself was not authorized by law. That being so, under 31A-21-104(5) the court could and would order that Plaintiff did not have an insurable interest that allowed him to procure the proceeds of the policy as he attempted for himself. If he had an insurable interest he could have procured the proceeds for the purpose of passing the proceeds on to the survivors. The court could and would order that the proceeds be paid on an equitable basis to the surviving wife and children of Buchi, namely,

> defendants and counter claimants herein, who did have an insurable interest in Buchi's life.
>
> Defendant JoAnne Buchi's arguments with respect to the consent are subject to the same analysis as above. Buchi clearly signed the application and thus consented to the issuance of the policy. However, Buchi did not consent to the issuance of the policy that would provide for Plaintiff to receive the proceeds. Buchi consented to the issuance of a policy that was for the purposes set forth above, namely, as part of a legitimate buy-sell agreement."

((See attached hereto as Exhibit "2").

F. Glade Parduhn's attempt to abscond with the proceeds of the life insurance policy is a breach of the fiduciary duty he owed to Brad Buchi and his survivors and the partnership.

It is axiomatic that a partner owes a fiduciary duty of the highest standard to the other partners of a partnership. Moreover, a partner is a trustee for the other partners. As trustee, a partner holds in trust, for the benefit of the other partners, all income derived by virtue of being a partner in trust for the benefit of the other partners.

Utah Code Ann. §48-1-18 reads:

> "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits, derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property. This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner."

Simply put, partners "occupy a fiduciary relationship and must deal with each other in the utmost good faith." Ong Intern. (U.S.A.) v. 11th Ave. Corp., 850 P.2d 447, 453 (Utah 1993); Burke v. Farrell, 656 P.2d 1015, 1017 (Utah 1982).

In a justly famous case, Justice (then Judge) Benjamin Cardozo described the fiduciary duty imposed on partners. In Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928), Justice Cardozo stated:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties A trustee is held to something stricter than the morals of the market place *Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior* As to this there has developed a tradition that is unbending and inveterate Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd " (emphasis added)

Uncompromising rigidity should be the attitude of this Court in ruling upon Parduhn's petition to cheat JoAnne Buchi and the Buchi children of their rightful claim to the proceeds of the life insurance policy "Not honesty alone, but the punctilio[1] of an honor the most sensitive" is the standard of conduct to which Parduhn must adhere Parduhn owed, and continues to owe, a fiduciary duty of undivided loyalty to Brad and the partnership By petitioning this Court for an award of the proceeds of the life insurance policy in direct contravention of the intention of the partners and the partnership, Parduhn is breaching that fiduciary duty, lowering his conduct to the level "trodden by the crowd " This the Court cannot and should not allow it.

II. THE PARTNERSHIP AGREEMENT, INCLUDING THE BUY/SELL AGREEMENT, IS ENFORCEABLE AFTER THE DISSOLUTION OF THE PARTNERSHIP

As of the time of Brad Buchi's death on or about August 7, 1997, Brad and Parduhn were still partners They were in the process of winding up the business of the partnership but there was much unfinished business They had not identified or paid all the business creditors They had not completed any kind of accounting, or prepared the business taxes They had not determined the remaining assets and how the assets were going to be distributed They had made

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[1] *The New Shorter Oxford English Dictionary On Historical Principles*, Lesley Brown, ed (Clarendon Press, Oxford, 1993), defines "Punctilio" – "la A fine point or mark A high point, the acme, the apex 2 A minute detail of action or conduct, a delicate point of ceremony or honour "

no effort to calculate their capital accounts. They had not determined what to do with the "buy/sell" life insurance policies on Brad's life and Glade's life. They both knew the business had paid the premiums on the policies through at least September 1997.

Utah Code Ann. §48-1-26 and § 48-1-27 read as follows:

> §48-1-26. "Dissolution" defined.
>
> "The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business."
>
> §48-1-27. Partnership not terminated by dissolution.
>
> "On dissolution a partnership is not terminated, but continues until the winding up of partnership affairs is completed."

The Utah Supreme Court has held a partnership is not terminated even if it is dissolved. In Arndt v. First Interstate Bank of Utah, N.A., 991 P.2d 584 (Utah 2000), the Utah Supreme Court stated:

> "In this case, each of the partnerships dissolved upon the sale of its respective real estate. However, as section 48-2a-801 contemplates, the partnerships continued in existence after dissolution for the purpose of winding up their business." (*Id.* at P.14).

In McCune & McCune v. Mountain Bell Tel., 758 P.2d 914 (Utah 1988), the Utah Supreme Court held:

> "The record only shows that the partnership had been dissolved. Nothing indicates that there had been a winding up of the partnership or that its assets had been distributed to the partners. Despite the partnership's dissolution, it does not cease to exist 'until the winding up of a partnership affairs is completed.'" (*Id.*)
>
> See also Cheves v. Williams, 993 P.2d 191 (Utah 1999).

Under Utah law, Brad and Glade's partnership had not been terminated as of the date of Brad's death. Therefore, the Partnership Agreement, as amended, and the "buy/sell" provision were still in effect.

A. The life insurance proceeds must be paid to the wife and survivors of Brad Buchi, not the estate of Brad Buchi.

The Partnership Agreement provides that all the proceeds from the "buy/sell" insurance should be paid directly to the "wife or survivors" and not to the estate of Brad Buchi. Utah Code Ann. §75-6-201(1) specifically allows such non-testamentary transfers at death. It provides in part:

> Any of the following provisions in an **insurance policy**, ... conveyance, or **any other written instrument effective as a contract**, gift, conveyance or trust are considered **non-testamentary**, and this code does not invalidate the instrument or any provision: (a) that money or other benefits previously due to, controlled, or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing ... executed at the same time as the instrument or subsequently. (Emphasis added).

The official comments to that Section provide:

> Because the types of provisions described in the statute are characterized as **non-testamentary**, the instrument does not have to be executed in compliance with Section 75-2-502; nor does it have to be probated, nor does the personal representative have any power or duty with respect to the assets involved. (Emphasis added).

Therefore, under the Utah Probate Code, instruments like the Partnership Agreement are allowed to designate the beneficiary of the life insurance policy and provide that upon Brad's death, his interest in the partnership is transferred to Parduhn and the insurance proceeds to his wife and survivors. Judge Stirba so ruled in her Memorandum Decision of May 22, 2000 and Judge Lubeck reaffirmed this ruling.

III. SUFFICIENT EVIDENCE WAS PRODUCED AT TRIAL TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE PARTNERSHIP AGREEMENT WAS AMENDED WHEN THE LIFE INSURANCE POLICIES WERE INCREASED IN 1989.

Under Utah law, Brad and Glade's partnership had not been terminated as of the date of Brad's death. Most importantly, the partners hadn't discussed, let alone decided, what to do with the life insurance policies the partnership had purchased to fund the buy/sell provision of the partnership agreement. It is inconceivable that Brad intended for the life insurance policy on his life to be for the sole benefit of his partner to the detriment of his family. It is further inconceivable that Brad would have agreed that Glade was entitled to the proceeds of the life insurance policy and all or most of the remaining assets of the business he had built for nearly twenty years. Glade cannot point to a single shred of evidence to prove the partnership was terminated as of the day of Brad's death. This is especially true in relationship to the life insurance policies. What Glade would have this court do is superimpose an agreement between the partners that was never there instead of adhering to the agreement that was there. Therefore, the Partnership Agreement, as amended, and the "buy/sell" provision were still in effect.

The Partnership Agreement entered into by Glade Parduhn and Brad Buchi on May 23, 1979 was clear in most respect. They wanted to protect their families as well as each other in the event one of them died. They elected to use the vehicle of a "buy/sell" provision, which is fairly common in partnership arrangements. Under the provision, the partnership purchased life insurance policies on each of their lives naming the other partner as the beneficiary. In the event one partner died, the surviving partner could purchase the deceased partner's family's interest in the business from the proceeds of the life insurance. This arrangement provided peace of mind to each partner knowing his "wife or survivors" would be taken care of. It also gave the surviving

partner the financial means by which to buy out the deceased partner's family's interest without having to deplete the assets of the business.

Both Glade and Brad understood the importance of the "buy/sell" provision at the time they entered the agreement and throughout the partnership. Additionally, both partners recognized the need to increase the amount of the "buy/sell" life insurance as the business grew and its value increased. Both partners clearly agreed, by action and words, to increase the life insurance policies for the "buy/sell" provision to $100,000.00. None of the parties to the present action are disputing that.

It is JoAnne's position that Parduhn and Brad similarly agreed to amend the Partnership Agreement to increase the "buy/sell" life insurance policies in 1989 to $3000,000.00 on Brad's life and $250,000.00 on Glade's life. Sheldon Hansen, in his trial testimony, verified both Parduhn and Brad agreed on the increase for the purpose of the "buy/sell" provision. Lissa Buchi confirmed that Parduhn was fully aware the increase in both policies was to fund the "buy/sell" provision. Most importantly, Parduhn himself signed the applications for insurance acknowledging the policies were for the purpose of the "buy/sell" provision. He cannot in good faith now assert some side bar agreement with Brad where only $100,000.00 of the insurance proceeds should be distributed to Brad's "wife or survivors". Such a distribution is in clear opposition to the course of conduct between he and Brad, the trail and affidavit testimony of Sheldon Hansen and Lissa Buchi and the documentary evidence.

In Parduhn's Brief, he argues that Judge Lubeck conducted in speculation to conclude that the Partnership Agreement had been amended in 1989 to include the new life insurance policies in the amounts of $250,000 on Parduhn and $300,000 on Buchi. This argument is unfounded, as there was an abundance of evidence presented at trial that the Partnership

Agreement had been amended. This is a question of fact, and Judge Lubeck clearly found that there were sufficient facts to conclude that the Partnership Agreement had been amended. As stated in the Standard of Review section of this Brief, the Supreme Court upholds a lower court's findings of fact unless the evidence supporting them is so lacking that the Court must conclude the finding is 'clearly erroneous.'

At trial Lissa Buchi testified as follows:

MR. Tanner: Okay. Well let me move on. Do you recall when the policy amount was increased to $300,000?
A. Yes, I do.
Q. Okay, Do you recall approximately when that was?
A. It was early '89.
Q. Okay. And did you have a conversation with Mr. Parduhn present –
A. I did.
Q. -- dealing with the $300,000 policy.
A. Yes.
Q. Where did that occur?
A. At the Texaco station in the office.
Q. Okay.
A. The back office.
Q. Okay. And who was present at that time?
A. Brad, Galde and myself.
Q. Okay. Could you state the conversation that occurred then?
A. Yes. If was concerning the buyout/sell agreement, insurance policy. I felt like it needed to be increased again, because, obviously, the business and partnership was doing much better. We had actually even had - it wasn't – I don't believe it was a serious one, and it wasn't documented but someone had come and made some type of offer to buy it, and it indicated it to be well over what we had valued it at before. And I felt like we should call Sheldon and have it upped to a higher figure.
Q. Okay. And so did you call Sheldon or was Sheldon called?
A. I did, yes, right there and then.
Q. At the station?
A. I did, on the station phone.
Q. And what was the gist of what you told him a that point in time?
A. That we wanted to up the buy/sell policy.
Q. Okay. Subsequently, was the policy increased?
A. Yes, it was.
Q. To what amounts?
A. 300,000 on Brad's life and 250 on Glade's.
Q. Okay. Were you ever privy to any conversation or have you ever seen any documentation or do you have any reason, in the scope of your knowledge, to

believe that the $300,000 policy on Brad's life was for any purpose other than the buy out?
A. Absolutely not.
(Trial Transcript, pp. 101-103).

Q. Okay. From there you made a phone call to Sheldon Hanson?
A. Yes.
Q. And during the course of that conversation with those individuals present, was there a discussion made about the amounts of coverage?
A. Yes.
Q. And were those varying amounts discussed with Mr. Parduhn and with your husband present?
A. Yes.
Q. Okay. And what was the nature of that discussion?
A. That they wanted the premiums to be the same amount, and Glade's was going to be – and Glade's was going to be higher to cover the same $300,000 because he was older than Brad and he was a smoker.
Q. Okay.
A. So, it was discussed between, actually, the two of them and me right there with Sheldon waiting on the line.
(Trial Transcript, pp. 104-105).

Additionally, insurance agent Sheldon Hanson testified at trial as follows:

Q. Okay. Do you recall becoming involved in an application on a $300,000 policy on the life of Brad Buchi and a $250,000 policy on the life of Glade Parduhn?
A. I do.
Q. Okay. Do you see there the owner's name is listed as "Glade Parduhn", correct?
A. That's correct.
Q. And if you go below there to item F:
"state purpose of insurance and nature of owner's insurable interest," and it lists: "Buy/sell/partner"?
A. That's correct.
Q. Was it your understanding this policy then was somehow issued in connection with a buy/sell payment of parties?
A. That's correct, uh-huh.
(Trial Transcript, pp.131-132).

Q. And you determined that the insurable interest that needed to be noted in order for the policy to be appropriately written was that there was a buy/sell agreement in place?
A. That's correct.

Q. And you had a conversation with Mr. Parduhn to the effect that this particular policy was being purchased with reference to that buy/sell agreement or a buy/sell agreement?
A. I would presume that's correct. That's a long time ago, and I don't remember every word in those conversations. But that is consistent with my understanding of the intent of those policies, and its consistent with what I have recorded on the applications.
Q. Is that also consistent with your understanding as to the requirements of insurable interest?
A. Yes.
(Trial Transcript, p. 143).

This testimony rebuts Parduhn's argument that Judge Lubeck speculated that the $300,000 policy was intended to fund the buy/sell agreement. In response to Parduhn's argument that the different amounts of the policies is evidence of a different intent of the partners, the testimony of Lissa Buchi clearly puts a rest to that argument. The policies were in different amounts because the partners wanted to pay the same premium and Glade, because he was older and was a smoker, could not get the same policy amount as Brad for the same price. As stated by Judge Lubeck in the Memorandum Decision, why would Brad agree to receive $50,000 less if Parduhn died? The reason for the different amounts of insurance was that they wanted the premiums to be the same.

Additionally, Parduhn argues that there is no evidence that the partnership was worth $600,000, the logical predicate that one partner would pay $300,000 for the one-half partnership interest. On the contrary, the partnership assets were sold for $1,000,000, indicating that one-half of the partnership was worth well over $300,000. This argument is a red herring.

Another red herring is Parduhn's argument that Brad Buchi had provided for the protection of his family with other life insurance policies. At trial Lissa Buchi testified as follows regarding the other policy:

Q. Okay. Did you ultimately get, as has also been testified of, a separate policy on your husbands life?

A. Myself?
Q. Yes.
A. I did.
Q. What was the amount of that separate policy?
A. 250,000.
Q. And why did you obtain a separate policy beyond this buy/sell agreement policy?
A. Because I felt I needed more. I had five kids and was solely dependant on Brad.
(Trial Transcript, pp. 105-106).

Contrary to what Mr. Parduhn would have this court believe, one policy was not for Brad's family and one was not for Brad's partner. Lissa Buchi felt that she needed more protection from another policy to adequately care for her family in the case of Brad's death. That was on top of the policy funding the buy/sell agreement.

Parduhn cites as the most damaging evidence to defendant's case as being defendant's Trial Exhibit 3. Exhibit 3 is a copy of the 1984 handwritten amendment on which someone had added handwritten language at the bottom. The added notation was dated September 11, 1990 and the handwriting was identified at trial by Lissa Buchi as being Brad's handwriting. In his Brief, Parduhn cited the language as stating "This needs to be amended." However, Parduhn fails to cite the entire note. The note states in its entirety:

This needs to be changed to
300,000 – on Brad insurance is this now
250,000 – on Glade 9-11-90
(Defendant's Addendum, Ex. ___).

Parduhn argues that because the language "to be changed" was used, that demonstrates that Brad and Parduhn never had a meeting of the minds on this issue. To the contrary, a just as plausible explanation is that the language "needs to be changed" means there **already had been a meeting of the minds**. The testimony of Lissa Buchi supports this conclusion as she testified that Parduhn was present when she discussed increasing the policy for the buy/sell agreement and

that they discussed the issue while Sheldon Hanson was on the phone. This testimony supports Judge Lubeck's decision, and Parduhn only tries to torture the language for his own purposes.

Of significance, Judge Lubeck did not base his decision on Brad's handwritten notes of September 11, 1990. He believed there was sufficient evidence in the four corners of the Partnership Agreement, the insurance policies and applications for the insurance policies in 1989 to support his conclusion the partners agreed to increase the amount payable on the buy/sell agreement.

As the trial testimony demonstrates, Judge Lubeck based his finding of fact on the evidence presented. This Court cannot reverse Judge Lubeck's decision that the Partnership Agreement, specifically the buy/sell agreement, was amended in 1989 unless the evidence is so lacking that this Court concludes Judge Lubeck's decision was clearly erroneous. Parduhn fails to marshal the evidence to meet this standard and the evidence presented at trial strongly supports Judge Lubeck's decision. Parduhn only makes his arguments and then concludes that the "finding of fact is not supported by the evidence and is clearly erroneous." Parduhn then cites to Ogelsby-Barnitz Bank & Trust Co. v. Clark, 175 N.E. 2d 98 (Ohio App. 1959). As demonstrated above, the evidence in this case clearly supports Judge Lubeck's decision, and as will be demonstrated below, the Ogelsby-Barnitz Bank case is distinguishable.

The present case is distinguishable in many regards from the Oglesby-Barnitz Bank decision. There is no question Glade and Brad decided to amend the Partnership Agreement. They sought out the increases in the "buy/sell" life insurance by contacting and meeting with Sheldon Hansen, their insurance agent. They worked with Mr. Hansen to complete the applications and even went through a physical examination to increase the amounts to $300,000.00 on Brad's life and $250,000.00 on Glade's life. They each signed and verified the

policies were for the "buy/sell" provision. There can be no doubt these partners intended to amend the Partnership Agreement in this regard.

In Oglesby-Barnitz, the partners never took any steps to modify the Partnership Agreement but rather the life insurance policy amounts were increased automatically by the professional group from which the partners got their policies. The increased policy amount on the deceased partner was virtually by default rather than by the clear intent as demonstrated by Glade and Brad in the present case.

Additionally, the intent of the partners in this present case, as evidenced by the Partnership Agreement, distinguishes Oglesby-Barnitz. Brad and Glade's Partnership Agreement provides for transfer of **all** of Brad's Buchi's interest in the partnership business to Parduhn and **all** of the insurance proceeds to be paid to Brad Buchi's wife and survivors. In contrast, the court in Oglesby-Barnitz said:

> In the case before us, we conclude there is no **proof**, but only suspicion or guess, that when the policies were taken out and later enlarged, the partners **ever intended** that valuation of more than [the initial] $10,000 should be placed on the share of a deceased partner, or that more than [the initial] $10,000 should be paid for a partner's share following dissolution by death. (Emphasis added).

In the present case, there is undisputed proof that the partners had a history of modifying the Partnership buy/sell agreement to reflect the appreciation in value of the partnership. The partners in Oglesby-Barnitz never modified their buy/sell agreement. Also in Oglesby-Barnitz there was never any evidence by the partner's statements or actions that they intended to increase the amount of the insurance proceeds. In the present case there is ample evidence that the partners intended to, and did, change the amount of the insurance proceeds. Finally, Oglesby-Barnitz is an old case from a different jurisdiction that has no real bearing here.

Parduhn would have this Court believe that the increase in insurance to $300,000 was meant for him. However, if that were the case there would be more evidence of that intention. As Judge Lubeck pointed out shouldn't there be some written document to reflect that dramatic change. But both Brad and Glade knew that the buy/sell agreement was in force, and they knew that the insurance policy would be used to fund the buy/sell agreement. That is what they must have been doing when they increased the insurance policy amounts, otherwise they could have easily indicated that Glade would receive the benefits of the policy and the policy would not be used to fund the buy/sell agreement. The **only** evidence that Parduhn can point to that he should receive the proceeds of the policy, is in the application. The application asks two questions, but provides only one line to answer. The application asks, "Why are you buying this insurance and what is your insurable interest? Those are two distinct questions. The answer written in by Sheldon Hanson is "buy/sell/partner." Parduhn would have this court believe that the word "partner" applies to the question of "why are you buying this insurance?" That is clearly not the case. The correct answer to the question "why are you buying this insurance" is "buy/sell" and the correct answer to "what is your insurable interest" is "partner." All of the evidence in this case clearly indicates that the insurance policy was purchased to fund the buy/sell agreement. There is ample credible evidence that Brad and Glade increased the "buy/sell" life insurance on Brad's life to $300,000 and on Glade's life to $250,000 for the purpose of funding the buy/sell agreement.

Parduhn cites the Oregon Court of Appeals decision of Blandau v. Rennick, 935 P.2d 457 (Oregon 1997) as being relevant to the present case. It is not. In Blandau, the court found the Dissolution Agreement entered by the parties was not enforceable since the conditions precedent had not been met. It was not a question of "dissolution" v. "termination" as we have here. In all

reality Blandau, supports JoAnne's position. In both cases, the parties expressed the desire to dissolve the partnership and had taken steps to dissolve the partnership. In both cases, the partnerships had not been terminated and the winding up of the partnership business had not occurred when the partner died. In Blandau, the court found the Partnership Agreement was controlling regarding the termination and winding up of the business. Such should be the case here. Glade and Brad's Partnership Agreement should be enforced.

Parduhn also cites as authority, Girard Bank v. Hailey, 332 A.2d 443 (Pa. 1975). The Girard Bank case is not instructive and does not assist with an analysis of this case. There was no insurance policy in Girard Bank that was purchased for the purpose of funding the buy/sell provision of the Partnership Agreement. The issue was clearly drawn between which winding up approach was appropriate--pursuant to Mrs. Reid's letter or the Partnership Agreement. That is not the case here. Judge Lubeck's decision regarding the enforceability of the buy/sell agreement is solid and should stand.

A. The trial court did not commit error in using parol evidence in interpreting the beneficiary of the insurance proceeds

Parduhn also argues that Judge Lubeck committed error when he found the insurance contract to be ambiguous and looked to parol evidence to determine the beneficiary of the insurance proceeds. Parduhn agrues that just because he is the named beneficiary, he should automatically receive the insurance proceeds. However, as stated above, under §75-6-201(1) of the Utah Probate Code, the Code allows contracts such as the buy/sell agreement to change the beneficiary. Parduhn cites to Ward v. Intermountain Farmers Assn., 907 P.2d 264 (Utah 1995) as support for his position. However, the Ward case made a change to the Utah parol evidence rule, and actually supports Judge Lubeck's decision. In Ward, the Utah Supreme Court held:

> [R]ational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties ... so that the court

> can 'place itself in the same situation in which the parties found themselves at the time of the contract.' [citations omitted]. If after considering such evidence the court determines that the interpretations contended for are reasonably supported by the language of the contract, then extrinsic evidence is admissible to clarify the ambiguous terms. Conversely, if after considering such evidence, the court determines that the language of the contract is not ambiguous, then the parties intentions must be determined solely from the language of the contract.
> Id. at 268.

This is precisely the analysis that Judge Lubeck used in his Memorandum decision. Judge Lubeck stated:

> The court need not find whether the insurance contract was integrated. If it is an integrated contract, the court finds and concludes it is ambiguous. If it is not fully integrated, the application clearly becomes part of the contract and the evidence from that application can be considered. In either event, the court can and does examine parol evidence to determine the rights of the parties.
>
> The court finds by a preponderance of the evidence from the documents and the testimony that the parties did not intend that plaintiff be the beneficiary of the policy and the proceeds should be awarded to defendants.

Judge Lubeck followed Ward and concluded the interpretations proposed by JoAnne Buchi and the Buchi children were reasonably supported by the language of the contract, and then the extrinsic evidence was admissible to clarify the ambiguous terms.

B. The Court did not error in denying Parduhn's Motion for Summary Judgment filed on August 18, 2000.

Parduhn argues that there were no material facts in dispute in his Motion for Summary Judgment filed on August 18, 2000, and that therefore the court committed error in denying his motion. However, the standard for granting a motion for summary judgment under Utah R. Civ. P. 56 is that there is no genuine issue of material fact **and** that the moving party is entitled to judgment as a matter of law. The material facts in this case are what they are, one cannot change the evidence. However, JoAnne Buchi did dispute whether or not the partnership agreement had been amended in 1989. That is the one of the most important issues in this case, and in the Memorandum in Opposition JoAnne disputed Parduhn assertion that the Partnership Agreement

had not been amended and at oral argument, JoAnne and Parduhn were in dispute about whether or not the partnership agreement had been amended. JoAnne also vigorously disputed Parduhn regarding how the law applied to the facts. In Parduhn's Brief, he seems to forget the part of Rule 56 that states "and that the moving party is entitled to judgment as a matter of law." Clearly, he was not entitled to judgment as a matter of law because JoAnne Buchi and the Buchi children disputed his interpretation of the facts and how the law applies to them. Judge Stirba was correct to state that:

> After reviewing the record in this matter, the Court is persuaded there are disputed issues of fact regarding whether the partnership was dissolved by the sale of the two service stations to Blackett Oil or the death of Brad Buchi. Furthermore, even if it is assumed the partners were in the process of dissolution, there are disputed issues regarding whether the partnership agreement and its buy/sell provision remained in full force and effect.

The issue of whether the partnership agreement had been amended was in dispute all the way through trial, and Parduhn's argument in his Brief that there were no disputed material issues of fact belies the facts and arguments made in this case.

C. Utah Code Ann. §48-1-37 does not govern an insurance policy for a buy/sell agreement.

Parduhn argues in the alternative that the proceeds should be paid to Brad Buchi's estate and then the partnership assets would be divided pursuant to Utah Code Ann. §48-1-37. However, as demonstrated above, the proceeds of the life insurance policy do not get paid into Brad Buchi's estate. Furthermore, §48-1-37 only sets out the rules for distribution of assets after dissolution. It governs how the assets will be applied to various liabilities of the partnership. The statute is silent as to whether the buy/sell agreement still applies after dissolution.

As argued above, JoAnne Buchi asserts that the buy/sell agreement is still valid and applies after dissolution. In Parduhn's own Brief, on page 58 in his discussion of the Blandau case, he states, "As a matter of law, the Blandau-Rennick partnership was dissolved on Blandau's

death *and the partners' original buy-sell agreement, operative in the contingent event the partnership was dissolved because of a partner's death, was enforceable*." (Emphasis added). So Parduhn is acknowledging that a buy/sell agreement is enforceable upon the dissolution of the partnership. In this case, Judge Lubeck acknowledged that the partnership was dissolved on July 14, 1997, the date the assets were sold. What difference does it matter how the partnership was dissolved. The only issue that does matter in this case is that the buy/sell agreement still was enforceable. The partners had not discussed how they were going to dispose of the life insurance policies, as Parduhn acknowledged they were still winding up the partnership. Utah Code Ann. §48-1-37 does not govern how the life insurance policies are going to be disposed of, therefore, the buy/sell agreement is the only mechanism to govern how the policies are to be used upon the death of one partner, and the Partnership Agreement provides for transfer of **all** of Brad's Buchi's interest in the partnership business to Parduhn and **all** of the insurance proceeds to be paid to Brad Buchi's wife and survivors. Nowhere in the Partnership Agreement entered into between Brad Buchi and Parduhn does it provide that Parduhn is entitled to all or part of the proceeds of the policy. Parduhn's sole argument is that he was designated beneficiary in the policy itself. But under the terms of the Partnership Agreement, the sole reason the policy is there is so that all of the proceeds would fund the buy/sell agreement to be paid to Brad Buchi's wife and children. This fact easily overcomes mere designation of beneficiary.

IV. PARDUHN'S RIGHTS TO DUE PROCESS WERE NOT DENIED IN THIS CASE.

At the hearing held on October 5, 2001 before Judge Lubeck, after hearing arguments from both sides, Judge Lubeck stated and ruled as follows:

> THE COURT: All right. Thank you counsel.
>
> Well, let me say, as I may not have said at the trial, but I find that both parties are being zealous advocates for their clients, and I don't find any fault in anything that's occurred here. Let me say that I certainly would not have signed

the Judgment as I did on September 14th had I known there were pending objections. That's part of the difficultly of physically moving, is I just didn't have the file and I didn't – I wasn't aware of any that when I signed that judgment.

But nevertheless, I think that really now, we are kind of in the same position as if we had entertained those motions before I signed the judgment. So, while it is a matter of difficiulty and I recognize that this is a lot of money, I think, to everyone and it's not – it wasn't an easy decision initially and it still isn't. But I am going to deny the motion for temporary restraing order. I don't find that the elements are met. I don't find that there is irreparable harm. I don't find that there are serious issues yet that need to be litigated or that Mr. Parduhn is likely to prevail on those issues.

I think it's pretty clear that the balance of who may be harmed more is not resolved, but nevertheless, I think all those things have to be shown for me to grant a temporary restraining order. So I'm going to deny that.

I'm going to deny the motion to modify the memorandum decision. It simply was the best I can do, and nothing that has occurred, I think, changes my mind. I certainly went into this trial with a strong belief and with the understanding before, during and after the trial that if I ruled the way I did, there would be no second phase of the trial.

I don't find that the stipulation of August 20th means that if, in fact, there is some set off against the estate of Brad Buchi, that it was to come from these funds.

So it is my opinion that I ruled correctly with respect to the proceeds of this insurance policy and that Mr. Parduhn if, in fact, he has any setoff – an I don't rule that he does or doesn't, nor do I rule that he would or would not prevail. but if he does, any amounts that may be, it simply has to be against the estate of Brad Buchi.

I believe, as I wrote in the opinion, that the heirs are entitled to the proceeds of this policy. And, again, I would not have signed the order as I did. I would have given Mr. Parduhn the opportunity to do as he's done today. **I think my result – well I know my result – my decision would have been the same.**

And so I'm going to deny the motion to modify the decision. I'm going to deny the motion to stay. I believe this is a final order.
(Transcript of Hearing on October 5, 2001, pp. 34-36).

So Judge Lubeck stated that he didn't fault anyone for anything that had occurred, that he would have denied Pardhun's motion, and that the parties were in the same position as if he had heard the motion before he signed the judgment. Parduhn's due process rights were not compromised.

Parduhn also argues that his due process rights were denied by Judge Lubeck regarding the bifurcation issue. Parduhn claims that he is entitled to go forward with a second phase of the

trial regarding an alleged setoff against the estate of Brad Buchi. However, on numerous occasions, Parduhn's own counsel has in writing and in open court stated that if the judge ruled in favor of JoAnne Buchi and the Buchi children, that the second phase of the trial would not proceed.

On August 20, 2001, the day before the trial in this matter the parties appeared before Judge Lubeck and the following exchange took place.

> THE COURT: Well get it to me soon if you can.
> Now, let me – again, let me pause just a moment and make sure I understand it. If the ruling is in favor of the Defense in this case, there would be no second phase. But if it is not, there would be; is that correct?
>
> MR. FISHBURN: Yes
> (Transcript of Hearing on August 20, 2001, pp.45-46).

Parduhn claims the parties stipulated to bifurcate this trial and he is being denied the second phase of the trial. This is simply not true. While it is true the parties stipulated to bifurcate the trial, the second phase of the trial would only be necessary if Judge Lubeck ruled differently than he did. The stipulation was drafted by P. Bryan. Fishburn. He is fully aware of what the parties agreed to.

The Stipulation states clearly that the second phase of trial may or may not be necessary depending on how the court ruled. Exhibit 7 is a chart prepared by Joanne Buchi's counsel. It demonstrates that the second phase of the trial was rendered unnecessary by Judge Lubeck's and Judge Stirba's ruling.

Further, and most telling, counsel sent the proposed stipulation that was eventually adopted by the parties to them in April 2001. In a cover letter to his proposed stipulation, Mr. Fishburn wrote.

> "At the final pre-trial conference on December 1, 2000, we agreed to a bifurcation of issues to be tried. **The objective was to avoid the expensive time consuming accounting issues that would be relevant and required, if, but**

only if, the Court rules that the buy-sell agreement is a nullity and that Glade is entitled to all the life insurance proceeds."

(See Exhibit 10, letter with proposed stipulation attached of April 23, 2001).

Judge Lubeck determined the buy-sell agreement was in full force and effect-not a nullity and the Buchi family – not Glade Parduhn – is entitled to all the life insurance proceeds. Based on Mr. Fishburn's own pronouncements in his letter of April 23, 2001, and in open court on August 20, 2001, no second phase of the trial is necessary. For him to assert otherwise at this juncture can only be viewed as another attempt to mislead the court.

CONCLUSION

For the reasons set forth above Defendant JoAnne Buchi respectfully requests that this Court affirm the *Orders* denying Glade Parduhn's Motions for Summary Judgment and affirm the Memorandum Decision dated August 24, 2001, the Judgment and Instructions to Court Clerk dated September 14, 2001, and *Order* of Judge Lubeck dated October 16.

DATED this 15th day of February, 2002.

DUNN & DUNN, P.C.

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CERTIFICATE OF SERVICE

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I, Susan Black Dunn, certify that on this 15th day of February, 2002, I served a copy of the attached BRIEF OF APPELLEE upon P. Bryan Fishburn, the counsel for the Appellant, and Martin S. Tanner, counsel for Co-Appellees, in this matter, by personally serving it upon them at the following addresses

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